STATE OF MICHIGAN

COURT OF APPEALS

SALES ENGINEERING, INC.,

Plaintiff-Appellee,

v

COLLINS & AIKMAN PLASTICS, INC., a/k/a MANCHESTER PLASTICS LTD,

Defendant-Appellant,

and

AGUIRRE, C & A, LLC,

Defendant.

UNPUBLISHED
February 22, 2005

No. 251348
Oakland Circuit Court
LC No. 1999-014804-CK

Before: Gage, P.J., and Meter and Fort Hood, JJ.

PER CURIAM.

In this contract dispute over sales commissions allegedly owed, defendant Collins & Aikman Plastics, Inc., (C&A) appeals as of right from an order awarding plaintiff $4,182,536.56 in damages.[1] This appeal also involves several discovery orders, an order for discovery sanctions entered against C&A, a default judgment entered against C&A, and denials of C&A's motions for summary disposition and to modify or set aside the default. We affirm in part, reverse in part, vacate in part, and remand for further proceedings.

Plaintiff was a sales representation firm engaged in selling automobile parts for C&A pursuant to three sales agreements. These agreements covered several programs, only one of which – the GMX 270 lower instrument panel program – is in issue in this appeal. At some point during the course of the parties' relationship, C&A formed a minority joint venture company, Aguirre, which assembled and sold the GMX 270 lower instrument panel to General

[1] Plaintiff entered into a settlement with defendant Aguirre, C&A, LLC (Aguirre). Subsequently, Aguirre was dismissed from this action and is not a party to this appeal.

Motors (GM). It is undisputed that plaintiff never had a sales representation agreement with Aguirre.

In 1998, C&A terminated its representation agreements with plaintiff. Thereafter, plaintiff sued C&A and Aguirre, claiming breach of contract for failure to pay commissions in accordance with the terms of the three sales agreements. Plaintiff also requested declaratory relief that Attachment B of the 1995 sales agreement pertained to commissions to be paid to plaintiff by Aguirre for parts sold to GM. In addition, plaintiff made claims against both defendants under theories of unjust enrichment, promissory estoppel, and constructive trust.

During pretrial, plaintiff sought information on program sales from C&A and filed several requests for production of documents. Plaintiff also filed four motions to compel discovery, which were granted, and three motions for default. After the hearing on the second motion for default, the court entered an order requiring C&A to comply with the court's discovery orders, and warning that failure to do so would result in an entry of default. When the date on which the court required C&A to submit all documents to plaintiff passed without full compliance, the court entered a default against C&A.

C&A first claims that the default was improperly entered because it had substantially complied with the court's orders, and that any omissions were inadvertent. C&A further argues that the court erred in failing to conduct an evidentiary hearing on whether its failure to comply with discovery was willful and whether plaintiff was prejudiced by its actions. We review a trial court's decision to enter a default for an abuse of discretion. *Barclay v Crown Building and Development, Inc*, 241 Mich App 639, 642; 617 NW2d 373 (2000).

Default is an available sanction for discovery abuses. MCR 2.313(B)(2). When default is contemplated as a sanction, the trial court should consider "whether the failure to respond to discovery requests extends over a substantial period of time, whether there was a court order directing discovery that has not been complied with, the amount of time that has elapsed between the violation and the motion for default judgment, and whether wilfulness has been shown." *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396-397; 484 NW2d 718 (1992). The court must also evaluate on the record other available options before concluding that such a drastic sanction is warranted. *Id.* at 397. The sanction of default should be employed only when there has been "a flagrant and wanton refusal to facilitate discovery, that is, the failure must be conscious or intentional, not accidental or involuntary." *Id.*

The trial court issued several orders compelling C&A to produce specific documents, but C&A only partially complied with these orders.[2] C&A had properly received a lesser sanction of

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[2] After the hearing on plaintiff's third motion to compel C&A to produce documents, the trial court entered a very specific order that required C&A to produce all purchase orders, sales invoices, and delivery and payment records for each of seven listed programs and for a time period of 3 ½ years. After the hearing on plaintiff's first motion for default and sanctions, the trial court issued another very specific order that required C&A to produce purchase orders and invoices for specific programs, with the particular program and plant identified. When C&A again failed to comply, the trial court entered another order compelling production, referring
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$10,000 at the first default hearing. At the second default hearing, the court warned C&A that a default "shall enter" if it did not produce all the requested documents by a certain date. C&A failed to comply. Indeed, C&A essentially admitted that it had disobeyed the court's order by producing monthly summary reports instead of the original invoices, purchase orders, and delivery and payment records as specified in the court order.[3] It is clear from the record that C&A's failure to provide necessary documents extended over a long period, over seven months from the time the first order compelling discovery was entered until the time plaintiff filed its third motion for default. The court also gave C&A the option of opening its records to plaintiff, an option that C&A refused. Moreover, the court had already entered a $10,000 sanction against C&A to no avail. Finally, the order granting default was entered after plaintiff filed its *third* motion for a default.

We recognize that C&A produced 40,000 documents in this case. We are mindful that discovery can sometimes get out of hand, and the litigation in the instant case was particularly acrimonious. The trial court heard the parties' arguments and read the affidavits they presented. In sum, we agree with the trial court and give it the deference it deserves in concluding that C&A failed to substantially comply with the trial court orders. The circumstances of this failure evidence "a flagrant and wanton refusal to facilitate discovery" because C&A's failure to produce the purchase orders and invoices was "conscious or intentional, not accidental or involuntary." *Frankenmuth Mut Ins Co, supra* at 397.

Further, C&A's reliance on *Traxler v Ford Motor Co,* 227 Mich App 276; 576 NW2d 398 (1998), in support of its argument that the court was required to conduct an evidentiary hearing on the matter is misplaced. Not only is *Traxler* factually distinguishable, it also clearly states that due process does *not* require a full evidentiary hearing in all circumstances:

> Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker [sic]. The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence. [*Id.* at 288 (citation omitted).]

Traxler requires that the court find C&A's conduct willful and that plaintiff was prejudiced by C&A's acts. *Id.* The trial court conducted three hearings on plaintiff's motions for default, and C&A had the opportunity to fully present its case for failing to comply with the court's orders. To be willful, wrongful intent is not required. *Welch v J Walter Thompson USA, Inc,* 187 Mich App 49, 52; 466 NW2d 319 (1991). It is sufficient if the failure is "conscious or intentional, not accidental." *Id.* C&A was afforded several meaningful opportunities to know and respond to plaintiff's objections before the trial court.

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C&A to the previous order's specifics.

[3] Although we acknowledge that C&A provided plaintiff with monthly summary reports, these reports were not required by the trial court's orders compelling production. The orders specifically required purchase orders and invoices.

Additionally, plaintiff was prejudiced in that it had to pursue the information it sought in a series of motions and hearings. The material was discoverable and should have been timely provided so that plaintiff could determine what commissions were owed, if any, under the sales representation agreements. Accordingly, we see no abuse of discretion in the granting of a default as a sanction for C&A's repeated failure to comply with discovery orders.[4] *Mink v Masters*, 204 Mich App 242, 245; 514 NW2d 235 (1994).

In its brief on appeal, C&A challenges the $10,000 sanctions award. However, C&A failed to properly present this issue in the "Statement of Questions Involved" section of its brief, as required by MCR 7.212(C)(5). Therefore, we need not consider it. *Busch v Holmes*, 256 Mich App 4, 12; 662 NW2d 64 (2003). Moreover, C&A has presented no law to suggest that the imposition of monetary sanctions was improper. "It is not sufficient for a party 'simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.'" *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

C&A next argues that the trial court erred in granting plaintiff summary disposition. C&A asserts that, if the default was proper, it only established defendant's liability for plaintiff's well-pleaded allegations. C&A maintains that it should not have been held liable for sales of the GMX 270 lower instrument panel parts because plaintiff failed to properly plead the counts pertaining to these sales. We review de novo a trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

It is an established principle that "a default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue." *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000), quoting *Wood v DAIIE*, 413 Mich 573, 578; 321 NW2d 653 (1982). A default is not, however, an admission regarding damages; "a defendant has a right to participate where further proceedings are necessary to determine the amount of damages." *Kalamazoo Oil Co*, *supra* at 79; *Midwest Mental Health Clinic, PC v Blue Cross & Blue Shield of Michigan*, 119 Mich App 671, 675; 326 NW2d 599 (1982). "A defendant by defaulting does not admit mere conclusions of law which are unsupported by the facts alleged in the complaint[.]" *American Central Corp v Stevens Van Lines, Inc*, 103 Mich App 507, 514; 303 NW2d 234 (1981). Moreover, in a contract action, a defaulting defendant has a right to appear and contest the amount of damages, but the default fixes liability on the cause of action alleged, and admits that plaintiff is owed something. *Id.* at 512.

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[4] C&A also argues that plaintiff was not prejudiced with respect to the GMX 270 lower instrument panel program because none of the discovery orders pertained to this program. Because several of these orders do apply to this program, C&A's argument is entirely misplaced.

Plaintiff argues that paragraphs twenty[5] and twenty-eight[6] of its complaint were sufficient to establish C&A's liability for commissions on the GMX 270 lower instrument panel. Moreover, plaintiff argues that the default established that the 1995 sales agreement applied to GMX 270 sales made by Aguirre to GM. The heart of C&A's argument is that plaintiff's complaint failed to plead that C&A (rather than Aguirre) was liable for commissions on the GMX 270 lower instrument panel program. Specifically, C&A argues that the allegations in plaintiff's complaint incorporated the 1995 sales agreement by reference. C&A claims that this agreement specifies that commissions are owed only on sales made by C&A to GM for which payment is received by C&A. Because the GMX 270 lower instrument panel was assembled and sold by Aguirre, C&A argues that the 1995 sales agreement does not apply. C&A also observes that plaintiff had not made any "alter-ego" claims that might have established C&A's liability for Aguirre's sales.

In *Nishimatsu Const Co, Ltd v Houston Nat'l Bank*, 515 F2d 1200 (CA 5, 1975), an individual defendant was defaulted in a case involving a failure to pay a bank loan. The defendant attacked the trial court's finding of his personal liability for the sum owed on the ground that he had clearly signed the contract, on which the plaintiff had relied in its complaint, as an agent of the codefendant company. The court agreed, finding that the pleadings disclosed on their face allegations that defeated the plaintiff's claim that the defendant was personally liable for the loan.

In its analysis, the *Nishimatsu* court noted that the "defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law. In short, despite occasional statements to the contrary, a default is not treated as an absolute confession by the defendant of his liability and of the plaintiff's right to recover." *Nishimatsu, supra* at 1206. On appeal, a defendant may not challenge the sufficiency of the evidence, but it is "entitled to contest the sufficiency of the complaint and its allegations to support the judgment." *Id.*; see also *Buchanan v Bowman,* 820 F2d 359, 361 (CA 11, 1987). In other words, a "default judgment is unassailable on the merits but only so far as it is supported by well-pleaded allegations, assumed to be true." *Nishimatsu, supra* at 1206.

We believe that the above reasoning applies to the instant case. Even if the facts pleaded are taken as true, plaintiff's complaint does not provide a sufficient factual basis to establish C&A's liability for sales made by Aguirre. Indeed, plaintiff sued both C&A and Aguirre and in several instances pleaded in the alternative (i.e., that "C&A and/or Aguirre" was liable for commissions). Because plaintiff's allegations are not well pleaded, they are not admitted for purposes of establishing liability. Further, because plaintiff's claim regarding the application of the 1995 sales agreement is a legal conclusion, it is not deemed admitted in a default. *American Central Corp, supra* at 514.

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[5] "C&A has failed to pay to [plaintiff] all commissions due to it, in breach of the 1988 Agreement."

[6] "C&A has intentionally failed to pay to [plaintiff] all commissions due to it, in breach of its contracts with [plaintiff]."

It is undisputed that plaintiff's unjust enrichment, promissory estoppel, and constructive trust claims refer to the GMX 270 lower instrument panel sales. As C&A correctly argues, plaintiff's unjust enrichment claim cannot succeed because there is an express contract between the parties covering the subject matter. *Barber v SMH (US)*, 202 Mich App 366, 375; 509 NW2d 791 (1993). For promissory estoppel to apply, the promisee must reasonably rely on a clear and definite promise, the enforcement of which is required if injustice is to be avoided. *Martin v East Lansing School Dist*, 193 Mich App 166, 178-179; 483 NW2d 656 (1992). In the instant case, plaintiff alleges that "C&A and/or Aguirre" promised plaintiff that it would receive commissions for part sales to GM. Because plaintiff failed to specify which of these two defendants made the promise or which parts program the promise related to, this claim is not well pleaded. To prevail on a constructive trust claim, a plaintiff must show unjust enrichment on the part of C&A. *In re Swantek Estate*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Plaintiff's pleadings do not establish C&A's sole liability for commissions on all programs, including the GMX 270 lower instrument panel. Accordingly, the default did not establish liability for the GMX 270 lower instrument panel parts, and we reverse the trial court's order granting plaintiff summary disposition and remand to the trial court for further proceedings.

Lastly, C&A contends that it was deprived of its due process right to a jury trial when the trial court entered the default judgment because there were issues of fact regarding the damages amounts. Given our resolution of C&A's liability issue on the GMX 270 lower instrument panel parts, we vacate the default judgment.

Affirmed in part, reversed in part, vacated in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood